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# THE REUSE RIGHT IN COLORADO WATER LAW: A THEORY OF DOMINION

ALISON MAYNARD\*

The Colorado law governing the right to reuse or make successive use of return flows after a first use of water has been made is relatively strict compared to that in other western states. In other states, the right of a first user of tributary water to recapture seepage or return flows of that water is often permitted; in Colorado, "when the use has been completed the right of the user terminates."<sup>1</sup> The Colorado courts have taken the view that such return flow or seepage water is also tributary to the stream, and interception of it thus constitutes an interference with vested water rights.<sup>2</sup> Therefore, if a Colorado appropriator wishes to "recapture" tributary water return flows, he or she must make a separate appropriation for each successive use.<sup>3</sup> Each successive appropriation is thus subject to the test of availability of water and takes its place at the bottom of the priority system.

There is obviously a strong economic motivation in claiming water to be "reusable" in a prior appropriation state, therefore, since reusability circumvents entirely the priority system by which tributary water is allocated. Reusable water may be "taken off the top," and the owner does not have to stand in line for it.<sup>4</sup> Thus, in Colorado, the right of reuse is limited to return flows from waters which are not tributary, and so not initially subject to the priority system: developed,<sup>5</sup> foreign,<sup>6</sup>

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1. *Pulaski Irrigation Ditch Co. v. City of Trinidad*, 70 Colo. 565, 568, 203 P. 681, 683 (1922); *Water Supply and Storage Co. v. Curtis*, 733 P.2d 680 (Colo. 1987); *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922); A. TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5.05[3][b] (1989). Some cases suggest, however, there may be a right to recapture escaped surface water (running wastewater) before it has left the user's control and percolated into the ground, see *McKelvey v. North Sterling Irrigation Dist.*, 66 Colo. 11, 179 P. 872 (1919) (explained in *McCune*, 71 Colo. at 260-61, 206 P. at 395), and *Burkart v. Meiberg*, 37 Colo. 187, 86 P. 98 (1906). The distinction between irrigation wastewater and return flow is explained in *City of Boulder v. Boulder & Left Hand Ditch Co.*, 192 Colo. 219, 557 P.2d 1182 (1976). Wastewater is never deemed "used" in the first instance. *Id.* at 220, 557 P.2d at 1185.

2. *Comstock v. Ramsay*, 55 Colo. 144, 133 P. 1107 (1913); *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922). See also discussion in note 1, *supra*.

3. See *Curtis*, 733 P.2d 680; *McCune*, 206 P. 393.

4. See, e.g., *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 P. 129 (1919) (Garrigues, J., dissenting) and cases cited therein.

5. "Developed water, also described as artificial or salvaged water, is that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it." Note, *A Survey of Colorado Water Law*, 47 DEN. L.J. 226, at 356 (1970). See also *Southeastern Colo. Water*

and nontributary ground waters<sup>7</sup> only<sup>8</sup> (henceforth referred to as "developed water"), and even here there are certain threshold requirements governing the ability to reuse.

### THE LEGAL REQUIREMENTS OF REUSE

The right of a developer to reuse developed water, which "is that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it,"<sup>9</sup> exists in the common law and is also codified in different statutes.<sup>10</sup> The most particularized of these Colorado statutes states:

RIGHT TO REUSE OF IMPORTED WATER. (1) Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.

(2) To the extent that there exists a right to make a succession of uses of foreign, nontributary, or other developed water, such right is personal to the developer or his successors, lessees, contractees, or assigns. Such water, when released from the dominion of the user, becomes a part of the natural surface

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Conservancy Dist. v. Shelton Farms, 187 Colo. 181, 529 P.2d 1321 (1974); Pikes Peak Golf Club Inc. v. Kuiper, 169 Colo. 309, 455 P.2d 882 (1969); and Ripley v. Park Center Land and Water, 40 Colo. 129, 90 P. 75 (1907).

6. Foreign water is water which is imported into a stream system from an unconnected stream system. COLO. REV. STAT. § 37-82-106(1) (1990). See *Benson v. Burgess*, 192 Colo. 556, 561 P.2d 11 (1977); *City and County of Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972); and *Martz*, *Seepage Rights in Foreign Waters*, 22 ROCKY MTN. L. REV. 407 (1950). The term includes transmountain and transbasin waters.

7. Nontributary ground water is defined in pertinent part as "that ground water . . . the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream . . . at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal." COLO. REV. STAT. § 37-90-103(10.5) (1990). Because of the negligible hydraulic connection with tributary water, nontributary ground water is allocated based upon ownership of the overlying land, see COLO. REV. STAT. § 37-90-102(1) (1990), and is consequently private property. The reusability of nontributary water is established or assumed in COLO. REV. STAT. §§ 37-82-101, -82-106(2), -90-137(9)(b) (1990).

8. See *City and County of Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 53, 506 P.2d 144, 147 (1972) and cases cited therein. It has also become common to claim the right to reuse to extinction consumptive use (CU) water following a change of point of diversion or type or place of use. The writer knows of no reported decisions holding that such a right does in fact attach to CU water, however, and regards it as unlikely to withstand the scrutiny of the supreme court. Because CU water is still tributary water, it cannot lawfully, by the mere fact of being once quantified, be immunized from subsequent requantification in a later change proceeding, nor from a finding of abandonment. What is claimed to be "reusable to extinction," therefore, is in fact tributary return flow in which the appropriator has no property right. See, e.g., *Green v. Chaffee Ditch*, 150 Colo. 91, 371 P.2d 775 (1962).

9. *Fulton Ditch*, 179 Colo. at 53, 506 P.2d at 147.

10. See *Fulton Ditch*, 179 Colo. 47, 506 P.2d 144 and COLO. REV. STAT. § 37-82-106(1) (1990).

stream where released, subject to water rights on such stream in the order of their priority, but nothing in this subsection (2) shall affect the rights of the developer or his successors or assigns with respect to such foreign, nontributary, or developed water, nor shall dominion over such water be lost to the owner or user thereof by reason of use of a natural watercourse in the process of carrying such water to the place of its use or successive use.<sup>11</sup>

Subsection (1) of section 106 delimits the right to reuse in two respects: first, by allowing reuse of the water only "to the extent that its volume can be distinguished from the volume of the streams into which it is introduced"; and second, by requiring that no other vested water right be impaired or diminished by such reuse.<sup>12</sup> The two requirements of this subsection thus set up an injury analysis which must be satisfied before the right to reuse is recognized.

Subsection (2) of section 106, added in 1979,<sup>13</sup> articulates a third limitation on the right to reuse: the user must maintain the personal property right in the water. The impetus for the bill was the "Huston filings" for 444 c.f.s., whereby Mr. Huston sought to recapture, independent of the priority system, return flows from nontributary waters developed by others' deep wells, which had escaped to the South Platte River.<sup>14</sup> Discussions in both the Colorado Senate and House Committees, which considered this amendment, emphasized that it was enacted for the purpose of clarifying by statute what the legislators felt had always been historically a part of the law. They stated that the bill was intended neither to expand upon nor diminish the right of a developer or his assigns to reuse foreign water. Rather, it was to make clear that a complete stranger to the water, such as Mr. Huston, had no such right.

The difficulty raised by the language in subsection (2), however, is that the right to reuse is not merely dependent upon a showing of the personal property right as determined by contractual privity, but is also coextensive with the prospective reuser's retention of "dominion" over the water. Whether that mystical term adds or ought to add any new conditions on reuse which must be satisfied in addition to privity, and in addition to the injury analysis required in subsection (1), requires examination.

### THE MEANING OF "DOMINION"

No definition of "dominion" is provided in subsection (2)<sup>15</sup> or anywhere in the water statutes, even though it is used at least three

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11. COLO. REV. STAT. § 37-82-106 (1990).

12. *Id.* at § 37-82-106(1).

13. S.B. 481, 52d Leg., 1st Reg. Sess., 1979 Colo. Laws 1366 (codified at COLO. REV. STAT. § 37-82-106(2) (1990)).

14. Characterization by Mr. Ward Fischer, during testimony on S.B. 481 before Senate Agricultural Committee, March 15, 1979, at approximately 1:37 p.m. See also State Dept. of Natural Resources v. Southwestern Colo. Water Conservancy Dist., 671 P.2d 1294 (Colo. 1983) ("*Huston II*").

15. COLO. REV. STAT. § 37-82-106(2) (1990).

times.<sup>16</sup> Nevertheless, "dominion is a word of distinctive legal meaning,"<sup>17</sup> and consequently lawyers might feel they instinctively understand it. For example, a definition of "dominion" which has been frequently used by courts<sup>18</sup> comports with the general understanding of the concept. "Dominion" is "[p]erfect control in right of ownership. The word implies both title and possession and appears to require a complete retention of control over disposition. Title to an article of property which arises from the power of disposition and the right of claiming it."<sup>19</sup>

The problem with relying on this definition too much, however, is that it, and the concept it defines, arose not in the context of water law, but was probably borrowed from the law of immutable discrete chattels and fixed real property. The idea of dominion over *water*, which is migratory, fluid, and mixable in character, confounds the intuition. Words like "possession" and "control," easily enough understood when applied to a chattel, become problematic when applied to water.

Yet the definition is helpful in one respect, which is that of title: clarifying that dominion is exactly the "right of claiming" the water and the "right of ownership."<sup>20</sup> Dominion thus *is* the right to recapture the water for reuse and *is* the personal property right. From the outset, then, it can be easily remarked that the separate statutory requirement of contractual privity is comprehended within the term "dominion" and is, therefore, redundant. But it also follows that if there are authorities, for example, in other states, which have found the satisfaction of certain external conditions to be prerequisite to retention of the personal property right or of the right of claiming the water from others, these conditions also constitute components of "dominion," and could by the use of that word in the Colorado statute properly be considered incorporated into Colorado law.

Thus, although the right to recapture and reuse water in other western states applies often even to appropriative waters, and so is qualitatively different from the Colorado law, the guidelines courts have used in those states in finding or not finding the right to reuse should be useful. Similarly, those Colorado cases which have denied the right of reuse of tributary water provide insight into the problem, as whether or not dominion is retained is a question which can be addressed independently from that of the initial character of the water sought to be reused.

As could be expected, then, the cut-off point in these cases (the point where the personal property right in the water terminates and the right to reuse is consequently extinguished) often will not be labeled "loss of dominion" *per se*. The word "dominion" may never appear at all. Rather, the right of reuse will be denied due to some other condi-

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16. See COLO. REV. STAT. §§ 37-82-101(1), -82-106(2), -90-137(9)(b) (1990).

17. Whelan v. Henderson, 137 S.W.2d 150, 153 (Tex. Civ. App. 1939).

18. Eastex Aviation v. Sperry and Hutchinson Co., 522 F.2d 1299, 1305 (5th Cir. 1975) (citing Black's Law Dictionary) and cases cited therein.

19. BLACK'S LAW DICTIONARY 486 (6th ed. 1990).

20. *Id.*

tion or conditions, which, as will be seen, appear always to be variants of the following: abandonment, failure to identify, and loss of possession (or control) of the water.

Specific cases will be discussed where relevant in this article. Before leaving the task of circumscribing the concept of "dominion" as far as possible at the outset, however, it is instructive to examine one more source: the understanding the legislators may have had of the term, as reflected in the testimony and questions asked of expert witnesses at the time subsection (2) was added to section 106 in 1979,<sup>21</sup> for "[w]ords and phrases which have acquired a technical or particular meaning, whether by legislative definition *or otherwise*, shall be construed accordingly."<sup>22</sup> For example, the testimony of Mr. Ward Fischer, a Colorado water lawyer, on the bill during committee hearings in the senate, equated loss of dominion with abandonment:

[W]hile a person who is a developer of water can use that water until it is totally consumed, by a succession of uses or reuse or otherwise, once he abandons that water and it goes back to the stream, it belongs to the other appropriators on the stream, and that is the existing law.<sup>23</sup>

In the course of discussions of the Huston filings during the committee hearing in the house, Mr. Fischer was also asked, "Would you differentiate between after the waters get into the South Platte, or just prior to that? Would there be a difference there?"

His answer to that question revealed a somewhat different aspect of his understanding of "dominion" as applied to water:

I think the difference is, as long as the developer *controls* the developed waters . . . he could totally consume them. *Once they have left his control*, they became part of the waters of the stream, because they became part of the groundwaters which are tributary to that stream . . . . *As soon as he loses control of them, they're gone.*<sup>24</sup>

Mr. Glenn Saunders, another prominent Colorado water lawyer, testified that the right of reuse was dependent not only on dominion, but on the ability to identify the water:

We have made it clear now by both statute and judicial decision that [the] appropriator of [developed] water may make a succession of uses of that water *so long as he maintains it within his dominion and can identify it quantitatively.*<sup>25</sup>

Thus, as a first attempt at defining "dominion," the ability to claim the water from others and subsequently dispose of it, evidenced by

21. COLO. REV. STAT. § 37-82-106 (1990).

22. COLO. REV. STAT. § 2-4-101 (1973) (emphasis added).

23. Testimony on S.B. 481, *supra* note 13, before Senate Agriculture Committee, March 15, 1979, at approximately 1:35 p.m.

24. Testimony of Mr. Ward Fischer before House Agriculture, Livestock, and Natural Resources Committee hearings on S.B. 481, *supra* note 13, May 7, 1979, at approximately 4:06 p.m. (emphasis added).

25. Senate Agriculture Committee hearings, *supra* note 14, at approximately 3:00 p.m. (emphasis added).

"nonabandonment" or intent to reuse, identification,<sup>26</sup> and control, would appear to have been its meaning in the legislators' eyes.

In fact, those three terms which the legislators understood to be the hallmarks of "dominion" are the same which keep reappearing in the case law from other states,<sup>27</sup> like beacons in the mist: intent, identification, and control. As will be seen, any particular element of these three may be emphasized with or without the others, in different proportions, any one assuming paramountcy depending on the aspect of reuse which is important in the case at hand. It is reasonable, therefore, to regard these three elements as the primary components of "dominion."

#### INTENT AS AN ELEMENT OF DOMINION

The intent to reuse is at this point in Colorado law primarily an implicit, common-law requirement on the prospective reuser, and perhaps so obvious as to appear simplistic. The user of developed water must intend to reuse, at the very least, or the statute compels that the water discharged after first use will belong to the stream.<sup>28</sup> Intent to reuse probably can be presumed if the developed water remains always in the continuous actual possession of the owner, meaning inside a confining structure within the boundaries of his or her property. When the water either leaves the owner's property or leaves confinement, however, intent would seem to be critical as the "first cut" to distinguish the prospective reuser from the abandoner, who discharges water to the stream merely to get rid of it.

That the legislature thought it necessary to insert express language permitting the use of a natural watercourse as a conduit to take reusable water downstream to the place of successive use reinforces this view.<sup>29</sup> Only if the placing of the water in the watercourse is purposeful (done with a specific type and place of successive use in mind) does this language have effect, as the reason for it is to protect the reuser from the interpretation of abandonment of the water that would normally attach to such a practice. As a Colorado Supreme Court Chief Justice once stated, "[I]f it was put in with the intention of taking it out and using it, it belongs to the person causing the increase."<sup>30</sup>

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26. Although concededly redundant with the "volumetric distinction" requirement in COLO. REV. STAT. § 37-82-106 (1) (1990) that "identification" is also understood by many to be comprehended within "dominion" is explored more fully in the "Identification and the Burden of Proof" section of this article.

27. See also Annotation, *Right of Appropriator of Water to Recapture Water which has Escaped or is Otherwise No Longer Within the Immediate Possession*, 89 A.L.R. 210 (1934), for more cases.

28. COLO. REV. STAT. § 37-82-106(2) (1990) ("Such water, when released from the dominion of the user, becomes a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority . . .").

29. See Annotation, *supra* note 27, at § II(a), and *Ramshorn Ditch Co. v. United States*, 269 F. 80 (8th Cir. 1920), *aff'd* *United States v. Ramshorn Ditch Co.*, 254 F. 842 (D.C. 1918) (dealing with appropriative water).

30. *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 451, 191 P. 129, 134 (1919) (Garrigues, C.J., dissenting). Although Justice Garrigues was outvoted on his characterization of the water in this case as "developed water,"

The difficult question to answer is when, if ever, in Colorado intent must manifest itself to ensure the right of reuse. For example, may the developer who has been heedlessly discharging return flows from developed water for many years suddenly form the intent to reuse, change her or his practice, and begin capturing that water to use over? Section 106<sup>31</sup> cannot readily be interpreted as providing an answer to this question. The Colorado Supreme Court has also avoided addressing this issue, the equitable "flip side" of which is reliance on the developed water return flows by downstream juniors who made their appropriations in the expectation that the waters they saw available at the time were waters of the state, rather than waters which were privately owned.

The question may perhaps be answered if some confusion in the labeling is unraveled. In the cases where intent is discussed, it is sometimes characterized as the intent to recapture and reuse,<sup>32</sup> and sometimes as merely the intent not to abandon.<sup>33</sup> These are in fact two distinct problems. As the doctrine of abandonment comes into play only if there is a delay between the commencement of first use and the implementation of recapture/reuse plans, "intent not to abandon" should need to be proved, if at all, not in lieu of intent to reuse, but rather regarded as an additional hurdle which may need to be overcome by the nondiligent reuser.

The most positive proof that there exists intent to reuse, other than the continuous possession/confinement scenario already mentioned, would be a comprehensive plan for reuse to be implemented concurrently with the initial use of the developed water.<sup>34</sup> This level of proof thus is similar to that required for the intent to appropriate in the conditional water rights context, constituting a "fixed purpose to pursue . . . a certain course of action."<sup>35</sup> Intent to reuse should be regarded as a question of fact, proved by concrete plans which indicate the place and type of each successive use to be made of the water, and also logically requiring evidence of the developer's ability accurately to identify, as well as to control (if necessary), the water sought to be reused.<sup>36</sup>

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the principles he reviewed as governing the right to reuse provide a helpful summary of the development of the law to that time.

31. COLO. REV. STAT. § 37-82-106 (1990).

32. See, e.g., *Ide v. United States*, 263 U.S. 497, 507 (1924) (the government's intent to use all the water for project purposes was "stated and restated in various official reports, . . . and was well understood by the project officers."); and *Rio Grande Reservoir*, 68 Colo. 437, 451, 191 P. 129, 134 (Justice Garrigues's dissent discussing cases where intent to recapture was present).

33. *Southeastern Colo. Water Conservation Dist. v. City of Florence*, 688 P.2d 715 (Colo. 1984) and *City and County of Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972) (both discussing the evidence of no intent to abandon).

34. See Wiel, *Mingling of Waters*, 29 HARV. L. REV. 137 (1915) and Fischer, *Re-Use of Foreign Waters*, 7 COLO. LAW. 523 (1978) (discussing concepts Wiel developed in his article); see also, Martz, *Seepage Rights in Foreign Waters*, 22 ROCKY MTN. L. REV. 407 (1950).

35. *Water Supply Storage Co. v. Curtis*, 733 P.2d 680, 683-84 (Colo. 1987) (quoting *City and County of Denver v. Colorado River Water Conservation Dist.*, 696 P.2d 730, 745 (Colo. 1985)).

36. See, e.g., *Ramshorn Ditch Co. v. United States*, 269 F. 80 (8th Cir. 1920) ("The existence or nonexistence of an intention to abandon is a question of fact," 269 F. at 84);



The argument for requiring an equivalent demonstration of intent in the reuse case to that in the conditional rights context is a sensible one. While proof of intent to appropriate in the conditional rights context does determine the extent of a property right,<sup>37</sup> not an issue when the subject is a quantity of water already privately owned, the type of proof required that no injury occur to vested water rights from the taking may be identical. In the conditional rights case, the injury question must be addressed in determining whether water is available for appropriation;<sup>38</sup> in the reuse case, the question must be addressed before recapture is allowed and the right to reuse recognized.<sup>39</sup> Proof of how much water will be taken out, at what locations and at what times, including in what quantities depletions will occur to the stream, should be fundamental to answering the injury question in both cases. Also, owners of vested water rights deserve the opportunity to discover the extent of a prospective reuser's plans for recapture and reuse in detail, and to be heard on the injury issue, as much as they do in the tributary conditional rights case.<sup>40</sup>

If the most positive proof of the intent to reuse is not present (meaning the plan for reuse is either not sufficiently detailed or is not implemented concurrently with initial use), the question of abandonment of the reuse right then could potentially arise. For example, in *Fulton Ditch Co.*, Denver thought it prudent to make "a good record" at trial that it never intended to abandon its return flows,<sup>41</sup> and the City of Pueblo did likewise in the most recent pronouncement of the supreme court on the reuse issue.<sup>42</sup> Proof of intent not to abandon might be adequately made by a reservation of the right to reuse expressed in the original decree for the water. Resume notice at the time of application would also have the salutary effect of putting later appropriators on notice that the enhanced flows they observe are in fact private property

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*Southeastern Colo. Water Conservation Dist. v. City of Florence*, 688 P.2d 715 (Colo. 1984); *Curtis*, 733 P.2d 680; COLO. REV. STAT. § 37-92-305(9)(b) (1990); and discussion in note 37 *infra*. Also see the "Control" section of this article.

37. A water right is established by an appropriation. COLO. REV. STAT. § 37-92-103(12) (1990). The definition of "appropriation" states that it means "the application of a *specified portion* of the waters of the state to a beneficial use . . . but no appropriation of water, either absolute or conditional, shall be held to occur when . . . [t]he purported appropriator of record does not have a *specific plan and intent* to divert, store, or otherwise capture, possess, and control a *specific quantity of water* for specific beneficial uses." COLO. REV. STAT. § 37-92-103(3)(a)(II) (1990) (emphasis added).

38. *Cache la Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 61, 550 P.2d 288, 294 (1976) ("water is available for appropriation when the diversion thereof does not injure holders of vested rights").

39. COLO. REV. STAT. § 37-82-106(1) (1990) ("Nothing in this section shall be construed to impair or diminish any water right which has become vested.").

40. See *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

41. *City and County of Denver v. Fulton Irrigation Ditch*, 179 Colo. 47, 58, 506 P.2d 144, 150 (1972) (The trial court did not, however, pass upon the issue).

42. *City of Florence v. Board of Waterworks*, 793 P.2d 148 (Colo. 1990). The supreme court quoted from the trial court's ruling: "Transmountain waters have unique properties, most importantly, the right to use, reuse, and successively use to extinction, free from the call of the river, *unless those reuse rights are somehow abandoned or otherwise surrendered*. The evidence showed that such a loss has not in fact occurred." *Id.* at 153 (emphasis added).

subject to discontinuance at any time.<sup>43</sup> Other evidence should also be admissible to the extent it is in the tributary water rights context.

But as mentioned, whether as a question of law the reuse right may be abandoned is dubious, and has not been addressed by the Colorado Supreme Court.<sup>44</sup> There is in fact some indication to the contrary in *City of Florence*. The supreme court stated there that "importers of foreign water are accorded wide latitude as to the use and disposal of the [imported] water" in finding that the general change of water right criteria did not apply to the imported water.<sup>45</sup> It also quoted with approval the principle set forth in a treatise on Colorado water law that "the appropriator of such waters may reduce or eliminate the amount of foreign water available to junior appropriators, by changing the time, place or manner in which these waters are used, even if junior appropriators are adversely affected."<sup>46</sup> Also, as Colorado law does not permit the reuse right to attach to tributary water, there is less motivation to apply abandonment principles to the reuse right here than there would be, say, in California. Adding to these statements the fact that there is no statutory diligence requirement on the right to reuse, unlike the conditional water right situation, it seems unlikely that the supreme court will find abandonment of the right to reuse even after many years of non-reuse. As it held for Pueblo against downstream juniors who complained of that city's decision to change the place of use of its imported water after years of heedless discharge,<sup>47</sup> the Court would probably also hold for the developer who finally formulates and implements a plan for recapture and reuse under the same circumstances.<sup>48</sup> For the part of the downstream junior, however, let it be also remarked that even if the reuse right may not be lost through abandonment, it potentially could be adversely possessed against the nondiligent reuser.<sup>49</sup>

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43. "[A]ppropriators on a stream have no vested right to a continuance of importation of foreign water which another has brought to the watershed." *Brighton Ditch v. City of Englewood*, 124 Colo. 366, 377, 237 P.2d 116, 122 (1951).

44. *Fischer, Re-Use of Foreign Waters*, 7 COLO. LAW. 523 (1978), distinguishes the abandonment of the "corpus of the water" from the abandonment of the reuse right. Certainly, physical abandonment of the water itself, as occurs when a gap exists between the initial use of the water and later implementation of plans for reuse, might serve as an indicator of intent to abandon the reuse right altogether.

45. *Florence*, 793 P.2d at 154.

46. *Id.*

47. *Florence*, 793 P.2d 148.

48. Nevertheless, a stipulated decree containing an effective diligence requirement was quoted with approval by the supreme court in *Fulton Ditch*, although not because of any equitable balancing of the reuser's versus the downstream users' rights. Rather, the reuse itself, as required in that decree, was seen as a way of furthering the goal of minimizing transbasin diversions from the Western slope. *City and County of Denver v. Fulton Irrigation Ditch*, 179 Colo. 47, 54-55, 506 P.2d 144, 148 (1972); accord *City of Florence v. Board of Waterworks*, 793 P.2d 148 (Colo. 1990). The implication, thus, is that there is a duty to reuse before more transmountain diversions should be allowed.

49. See, e.g., *Lomas v. Webster*, 109 Colo. 107, 122 P.2d 248 (1942) (dealing with adverse possession of nontributary seepage water arising on the lands of another). But see *Martz, supra* note 6.

## IDENTIFICATION AND THE BURDEN OF PROOF

A requirement that the reuser "identify" reusable water in the course of establishing the right to reuse is separately embodied in the statutory requirement of volumetric distinction.<sup>50</sup> Requiring that the reuser is in fact using her or his own water, and not water owned by others, also furthers the separate statutory requirement of no injury to vested water rights set forth in the same paragraph.<sup>51</sup> As the Montana Supreme Court has succinctly put it, "Whoso asserts that he is entitled to the exclusive use of water by reason of its development by him must assure the court by satisfactory proof that he is not intercepting the supply to which his neighbor is rightly entitled."<sup>52</sup> Other cases agree that the burden of proof as to identification is on the developer:

The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.<sup>53</sup>

As these quotations reflect a concern with injury, again, by analogy to the level of proof required to prove no injury in a change of water rights case it can be said that the reuser makes "satisfactory"<sup>54</sup> or "decisive" proof,<sup>55</sup> once specific injury to a vested right is asserted, by a preponderance of the evidence.<sup>56</sup>

As to the elements of identification, one Colorado water lawyer writing on the subject has characterized them as follows: "A prospective reuser must prove that it can maintain "dominion" of the water *by quantifying the amount, timing, and location of the return flows* in order to establish that it will be reusing its own water rather than water properly claimed by senior water rights."<sup>57</sup> Thus, each of these three elements, amount, timing, and location, should be proven by a preponderance of the evidence.

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50. COLO. REV. STAT. § 37-82-106(1) (1990) ("[S]uch appropriator may make a succession of uses of such water . . . to the extent that its volume can be distinguished from the volume of the streams into which it is introduced.").

51. *Id.*

52. *Smith v. Duff*, 39 Mont. 382, 391, 102 P. 984, 986-87 (1909).

53. *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 153 (1858). *See also, e.g.*, *United States v. Haga*, 276 F. 41, 43-44 (S.D. Cal. 1921) ("Nor is it essential to his control that the appropriator maintain continuous, actual possession of [water sought to be recaptured] . . . . *It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters.*") (emphasis added); *Comrie v. Sweet*, 75 Colo. 199, 201, 225 P. 214, 214-15 (1924); and *Herriman Irrigation Co. v. Keel*, 25 Utah 96, 115, 69 P. 719, 726 (1902) ("The burden . . . is upon him who turns water into a natural stream to show that he has not taken more out of it than belonged to him.").

54. *Smith*, 39 Mont. at 391, 102 P. at 986.

55. *Butte Canal*, 11 Cal. at 153.

56. *Danielson v. Jones*, 698 P.2d 240, 249 (Colo. 1985). *See also* *Hallenbeck v. Granby Ditch & Reservoir*, 160 Colo. 555, 568, 420 P.2d 419, 426-27 (1966); COLO. REV. STAT. § 13-25-127(1) (1987).

57. *Hallford, Water Reuse and Exchange Plans*, 17 COLO. LAW. 1083 (June 1988) (emphasis added) (footnote omitted).

Identification of the return flows contributed by the developer is the major stumbling block in plans for reuse. The statutory exception that dominion will not be lost merely by use of a "natural watercourse" to carry developed water to its place of use or successive use<sup>58</sup> raises the question of whether a tributary underground aquifer can constitute such a "natural watercourse." Developed water return flows which have traveled underground and intermingled with other waters of the state, after irrigation, for instance, if sufficiently identified therefore might be recoverable through wells, or even from the surface stream itself at a point down-gradient.

But in such a case, the problem of identification is considerably more complicated than it is in the simple surface water situation. For instance, the early cases involved developed water produced from a mine and turned into the watercourse via a flume, where it could be measured. Hence, such water was easily identifiable when taken out again downstream: there was effectively no time delay, and the water's physical presence in the stream was observed. The right of recapture for reuse was later established for wastewater discharges from municipal systems, where essentially the same circumstances are present.

The most important Colorado case to date dealing with the subject of reuse is a municipal wastewater case, *City and County of Denver v. Fulton Ditch*.<sup>59</sup> The court did not directly take up the issue of identification, since that issue was determined on the basis of stipulated facts. But the supreme court noted with approval that stipulation, which specified that "[t]he amounts of water put into the potable water distribution system by Denver, delivered into sanitary sewer systems, and discharged into the South Platte River are measured to the extent traceable or determined by calculations, interpolations, interpretations or estimates, based on measurements."<sup>60</sup>

These sorts of engineering or accounting procedures were important again in *City of Florence*,<sup>61</sup> which also concerned recapture and reuse of municipal wastewater discharges. In that case, the supreme court was content to rely on the trial court's findings of the adequacy of accounting methods employed, subject to approval by the division engineer, in determining the volume of water which could be exchanged while protecting against injury to other vested rights. The accounting procedures considered "the ratio of native to transmountain water in [Pueblo's water delivery and sanitary sewer system]; the infiltration of groundwater into the Pueblo system; and certain transit and stream losses."<sup>62</sup> It was remarked by the court in *City of Florence* that Pueblo's exchange of foreign water was similar to the plan of Denver's approved in *Fulton*

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58. COLO. REV. STAT. § 37-82-106(2) (1990).

59. *City and County of Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

60. *Id.* at 57, 506 P.2d at 149-50 (emphasis added).

61. *City of Florence v. Board of Waterworks*, 793 P.2d 148 (Colo. 1990).

62. *Id.* at 150, note 5.

*Ditch*.<sup>63</sup> In both, the proportion of developed water was known at all times: either measured directly, or determined by calculations based on prior measurement.

Indeed, the right of recapture and reuse in the municipal wastewater case is well established probably because identification is easy when the water is always effectively in a pipe (meaning always confined, as it goes from pipe to dishwasher, bathtub, toilet, or the like, and thence to a pipe again). It is similar to water produced from a mine, which, coming from confinement, is also effectively channelized, and so easily measurable before its discharge to the stream. A much different situation arises, however, in the irrigation context, when the water sought to be reused has percolated underground and mingled with other waters of the state. Whether the contributed water is in fact physically present at the time and point of recapture, and in the quantities expected, is an important question which cannot be answered by mere visual observation. "Accurate differentiation" of the waters is difficult to make,<sup>64</sup> and to date there are no reported Colorado cases which have authorized reuse of irrigation return flows.

There do exist cases involving irrigation or water conservancy districts, where the right to reuse irrigation return flows has been granted, and recapture of such waters has, at least on paper, been allowed to occur within the boundaries of the district.<sup>65</sup> But as all water rights in these cases apparently belonged exclusively to the district in question, the problem of differentiating the reusable developed water from waters subject to the priority system did not arise.<sup>66</sup> The applicability of such cases to the general situation (where not all waters are owned by the prospective reuser, who seeks to withdraw groundwater within the boundaries of her own property) is thus undecided. It seems clear, however, that dominion over real property should not be confused with dominion over return flows of water. Identification of waters sought to be

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63. *Id.* at 154.

64. See *Water Supply and Storage Co. v. Curtis*, 722 P.2d 680 (Colo. 1987); *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922).

65. See, e.g., *Estes Park v. N. Colo. Water Conservancy Dist.*, 677 P.2d 320 (Colo. 1984); *Stevens v. Oakdale Irrigation Dist.*, 90 P.2d 58 (Cal. 1939); and *Concerning the Application for Water Rights of James L. Orr* ("the Cottonwood case"), 81CW142, Water Division 1 (March 21, 1986) (when appealed to the supreme court, the issue of dominion over the return flows was not contested). In *Curtis*, 733 P.2d 680, there was no express requirement the recapture be done within the district's boundaries. The supreme court remanded the case to the trial court, however, to make an "accurate differentiation" of the foreign water from waters of the state. After remand, a settlement was reached; the stipulated decree then requires the applicant to "install such measuring and recording devices and institute such accounting practices as are acceptable to and required by the State and Division Engineers." Amendment to Decree in Case No. 82CW289, Water Division 1, April 19, 1988. Identification was thus required to be made here.

66. See discussion in note 65 *supra*. It is important to note that the "reuse" reserved by the District for its irrigation return flows in *Estes Park*, 677 P.2d 320, in fact appears to be merely a concession of abandonment of such flows to the stream. There is no indication that the District's downstream ratepayers could take the return flows independent of the priority system. It appears, to the contrary, those flows merely augment the supply available to them, which users take pursuant to their respective decrees or shares.

recaptured must still be made, in spite of the developer's ownership of the property.

Yet the problem would appear at this point in the development of the law to be one of proof, not of principle. Although there is no right under Colorado law to recapture seepage water, that stricture applies to tributary waters, not waters which are "paid for" and have been transformed into private property. Thus, if the prospective reuser develops the technical wherewithal to tag the individual water molecules belonging to him or to measure or otherwise deduce with adequate precision the proportion of that privately-owned water to other waters of the state, it may be possible to meet the burden of proof as to identification of developed water return flows.<sup>67</sup> Logically, however, as a general rule identification should be easy. Whatever "dominion" over water really is, it is indisputably present if that water, after first use, is in confinement, and so capable of measurement prior to its commingling with other waters of the state. The more complex the proof of identification of the water becomes, however (meaning the further removed from actual physical measurement of the return flows themselves, and the more dependent on measurements of other factors or on estimates and mathematical proofs in lieu of measurement), the more suspect that the water is physically present at all, that it may be recaptured without injury, and thus that it may be reused.

#### THE REQUIREMENT OF CONTROL

In other legal contexts, where the term "dominion" is apparently well understood, it is defined as including "control."<sup>68</sup> Even though the terms are often used together in legal parlance ("dominion and control") as well as in section 137(9),<sup>69</sup> a more reasonable interpretation for this use than that the words have different substantive meanings is the fondness of lawyers for coupled synonyms (like "cease and desist" and "null and void").<sup>70</sup> Thus, "control" could easily be considered an all-

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67. The applicant in case no. 88CW246 in Water Division 1, the Clear Creek Skiing Corporation, for example, sought the right to recapture and reuse for augmentation foreign water applied to the Loveland ski areas as artificial snow, when those flows melted and returned to the stream the following spring. The initial plan to reuse this water was denied by the court (decree of Feb. 1, 1990), as the applicant proposed no accurate method to distinguish its contribution from natural snowmelt. Although on a seasonal basis, the quantity of reusable water was sufficiently known, the actual timing and location of the return flows were not.

Pursuant to its statutory right to propose additional terms and conditions to prevent injury (COLO. REV. STAT. § 37-92-305(3) (1990)), however, the applicant made a new proposal to install a "Snotel" instrument, which would measure natural precipitation as well as the reduction in snow-water equivalent when melting occurred. As the ratio of applicant's water to the natural snow was known then, as were the times of actual melting and return to the stream, the court subsequently decreed (January 14, 1991) that the applicant had met its burden of proof as to no injury resulting from the recapture and reuse. The legal right to reuse was thus established.

68. See definition of "dominion" in BLACK'S LAW DICTIONARY, *supra*, note 19, and Fischer, *supra*, note 24.

69. COLO. REV. STAT. § 37-90-137(9) (1990).

70. R. MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 4-5 (1982).

purpose synonym for dominion; however, for purposes of this discussion it will not be. Rather, as "intent" and "identification" have been employed as separate elements of dominion, "control" as the missing included component will also be restricted to a specific meaning which does not overlap those terms, and so can be analyzed separately. Here, "control" will mean the ability to regulate the flow of water, an ability which presupposes physical confinement. Assigning such a meaning to "control" is useful precisely because it permits identification then to be analyzed separately, and at least theoretically accomplished without the necessity for physical confinement.

That the right of reuse, or the concept of dominion, is not completely described without the added parameter of control is apparent first by analogy to appropriative water law, where control is fundamental. Sections 305(9)(a) and (b)<sup>71</sup> provide that a decree for absolute and conditional water rights may be granted only to the extent it is established that the waters have been (or can and will be) *diverted, stored, or otherwise captured, possessed, and controlled*.<sup>72</sup> The separate statutory definitions of "divert" and "store"<sup>73</sup> also comprehend control of the water, which as a practical matter requires it to be within some confining structure.

In appropriative water law, the point at which control is no longer required is generally that point at which the water is applied to beneficial use. It is readily apparent that water cannot be used for most purposes if it remains always in the structure used for its diversion or storage. The requirement of control, then, while a practical as well as a legal prerequisite to the beneficial use of water, is often antithetical to it. This irony is much more serious in the reuse situation, as if the right to reuse is held to depend on continuous control of the water, as in a pipe, the ability to apply it to first use is severely restricted. The municipal water/wastewater reuse precedent set by *Fulton Ditch* may be unique in meeting the requirement of continuous, or near-continuous, control of the water.<sup>74</sup> And, as the municipal example is the only one to date addressed by the Colorado Supreme Court, it is not known whether "reusable water" is by definition restricted to only that which is continuously controlled.

Yet it seems unduly harsh to require continuous control, in light of the separate and stringent requirement of identification. If it is determined that identification of the developed water after first use is adequate, so that recapture can proceed without injury, by analogy to appropriative water law "control" should become important, if at all, only in the course of applying the recaptured water to its next use. The inquiry is thus reduced to whether recapture must in fact be physically

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71. COLO. REV. STAT. §§ 37-92-305(9)(a), (b) (1990).

72. *Id.*

73. *Id.* at §§ 37-92-103(7), (10.5).

74. *City and County of Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

effected in a particular situation for reuse to proceed without injury, or whether recapture can be forgone. The answer to that inquiry is that the level of control required should be entirely determined by an injury analysis made with reference to the nature of the successive use.

One method of achieving control, the type utilized in the municipal cases, would be an exchange into storage. *City of Florence*<sup>75</sup> and *Fulton Ditch*<sup>76</sup> involved exchanges into storage of native water for the foreign contribution in municipal wastewater. The amount taken in at the reservoir in these cases (ignoring losses) was equivalent to the amount of foreign wastewater released. The rate of entry into storage could also easily be tied to the rate of discharge. Thus, in any such exchange case the water which is ultimately "reused" after the exchange is in fact not the water discharged from the treatment plant, but the water which has entered into storage upstream. "Recapture" thus actually occurs at the reservoir, while simultaneous identification occurs at the point of discharge. Control of the discharge is consequently unimportant; and controlled releases of reservoir water can easily be made, so that reuse can proceed whenever desired. It would seem that *wherever* the identification hurdle is overcome, whatever the source of developed water, and an exchange allowed to proceed as described (or similarly, when the identified water itself is directly placed into storage), the prospective reuser is "home free" on the control issue. The level of control achievable by releases from storage is sufficient for any successive use.<sup>77</sup>

In a second scenario, where the water is identified at the actual point of discharge, thence to be applied directly to the successive use without the benefit of storage, the ability to regulate the flow of water at the point of discharge may or may not be important. For instance, if the purpose of reuse is augmentation, whereby water must be supplied to seniors by the out-of-priority diverter at the time and place of the seniors' need, a high level of control of the augmentation sourcewater could be required.<sup>78</sup> Although many of these types of plans have been approved at the trial court level, it would seem that simply relying on a general, seasonal credit for return flows seeping back to the stream at their own rate might not suffice as sources for augmentation, as these flows cannot be turned on and off to satisfy the call. But if the second use is subirrigation of adjacent lands, or recharge of underground aquifers, control should then be unimportant.

### CONCLUSION

The concept of dominion in water law is best regarded as flexible, assuming almost different forms depending on which aspect of the prob-

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75. *City of Florence v. Board of Waterworks*, 793 P.2d 148 (Colo. 1990).

76. 179 Colo. 47, 506 P.2d 144 (1972).

77. Exchanges themselves are subject to legal requirements, an examination of which is beyond the scope of this article. See COLO. REV. STAT. § 37-83-101 (1990), and Hallford, *supra* note 57.

78. COLO. REV. STAT. § 37-92-305(8) (1990). Augmentation plans also require their own injury analysis.



lem of reuse is being examined. It might be useful to think of "reuse" as a three-stage process. At the first stage, the time of original use, it is intent which is most important in satisfying the requirement of dominion: the prospective reuser ideally should demonstrate a comprehensive plan which evidences the physical and legal ability to reuse. At the second stage, the time of recapture of return flows, it is identification which is primarily important: the developer must accurately differentiate the reusable water from other waters of the state, so that more is not taken out from the stream than has been contributed. At the third stage, the time of successive use, control may be particularly important, as the nature of the reuse may or may not require a high degree of control of the water in order adequately to forestall injury to vested water rights.

The ultimate conclusion arrived at here is that, since in Colorado the right of reuse can attach in the first instance only to waters not initially subject to the priority system, the corners of "dominion" are adequately pinned down by an injury analysis. That injury analysis is consistent with the reuse statute, but is not completely described without addressing all three criteria suggested here: intent, identification, and control. If the burden of proof as to each of these criteria is met, and the subsequent user has a statutorily permitted relationship to the original developer, the right of reuse then should be established.